The Planning Inspectorate

Appeal Decision

by B.S.Rogers BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 April 2021

Appeal Ref: APP/H2835/X/20/3263916
Former Scrap Yard, 304 Station Road, Isham, Northamptonshire

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Newton and Frost Fencing Ltd against the decision of Borough Council of Wellingborough.
- The application Ref: WP/20/00606/LDE, dated 9 September 2020, was refused by notice dated 19 November 2020.
- The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is that permitted pursuant to WP/2013/0420/F – Erection of workshop (Class B2) with ancillary offices (Unit A) together with separate office (Class B1) building (Unit B), new access road and parking.

Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the operational development which is considered to be lawful.

Preliminary Matter

2. In this appeal, the parties' cases are based on a photographic record of operations carried out and legal submissions. Accordingly, they have agreed that the appeal may be determined without the need for a site visit.

Reasons

3. The appeal site is a former scrap yard some 0.82 ha in size, located in the countryside a short distance to the NE of the village of Isham. Planning permission was granted by the Council on 13 November 2013 for the development set out in the 5th bullet point above, subject to 15 conditions, including the standard requirement to commence development within 3 years.

4. In 2016, the appellants submitted a condition discharge application (Ref: WP/16/00562/CND) in order to address pre-commencement conditions no.2 (external materials), no.3 (screen fencing/walling), no.4 (landscaping), no.6 (contamination), no.9 (surface water management strategy) and no.15 (foul water). The Council accepts that this was approved on 11 November 2016, to the extent that work was permitted to commence on site. As such, it is my understanding that the Council does not allege any failure to comply with the

Whitley[1] principle, in that the development did not begin in contravention of a condition precedent.

5. Section 56(2) of The Act indicates that development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out. There is no dispute that the operations which are claimed by the appellants to have begun the development met the time-based test in that they began before the crucial date of 13 November 2016. Accordingly, the main issue to be determined is whether the appellants lawfully implemented the planning permission by carrying out a material operation comprised in the development. The appellants rely on the definition of a 'material operation' in section 56(4)(d) of The Act: *any operation in the course of laying out or constructing a road or part of a road*.

6. The courts[2] have established that the test of whether development has begun is objective. The material operation is required to be i. undertaken in accordance with, and pursuant to, the planning permission; and ii. the operation must be 'material' rather than *de minimis*.

7. In this case, the appellants arranged for a digger and groundworkers to be on site on 11 November 2016. Their email of that same date to their agent states that "excavations have taken place for part of the driveway". Photographs taken that day show the digger in operation and the results of the operations. The approved plan shows the access road to enter the site in a straight line from the highway and it appears from the photographs that the digging was carried out along the line of this approved route.

8. There are no measurements attached to the photographs but the excavation appears to be of significant depth, extending into the sub-soil. To my mind, it amounts to far more than clearance of vegetation from the land; it has re-shaped the land to a noticeable degree. Such works would be a normal precursor to installing drainage and a base course for the approved road. It was not necessary for the excavation works to have been completed but to have been begun, to be part of, and to be useable for the intended purpose, and that appears to be the case here.

9. Plastic fencing was erected around the dig but, from the photographs, it appears that this was erected within the excavated area, and therefore after the digging took place. That particular procedure can therefore not have amounted to a material operation to lay out the road, akin to the pegging out of the road in the case of *Malvern Hills*[3] that was accepted as such.

10. The Council points out that no application was made to the Highway Authority for approval of works in the highway, such as a dropped kerb. However, whilst such approval would be required to complete the development, it does not appear necessary to begin the development, if all relevant operations were carried out within the site itself.

11. From the available evidence, I conclude that the appellants have demonstrated, on the balance of probability, that the planning permission in question was lawfully implemented before it expired. A material operation

[1] F.G.Whitley & Sons v SSW & Clwyd CC [1992] JPL 856
[2] Riordan Communications Ltd v South Bucks DC [2000] JPL 594
[3] Malvern Hills DC v SSE [1982] 1 EGLR 175

comprised in the development i.e. the excavation of part of the approved access road, was begun before the expiry date.

12. The Council has submitted that, even if the appellants are able to demonstrate a lawful commencement, it should be concluded that the use has been abandoned. There has been no further work on site since November 2016, it has become overgrown and there has been no application to the Highway Authority for approval of works in the highway, such as a dropped kerb. In *Hartley*[4] it was indicated that cessation of use can amount to abandonment if "the land has remained unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned".

13. However, in *Pioneer Aggregates*[5], a distinction was made between a use which had become lawful through the passage of time, such as was the case in *Hartley*, and one which was the subject of a grant of planning permission. Lord Scarman stated that "There is no principle in the planning law that a valid permission capable of being implemented according to its terms can be abandoned." That appears to be the case here.

14. In any event, there is no condition in the relevant permission requiring completion by a specific date and there has been no discontinuance notice. Although the appellants have not given reasons for the delay in continuing the operations, the land has not been put to any other use and no alternative permissions have been sought for this site. The appellants went to significant lengths in 2016 to comply with the terms of the planning permission, including submitting details to enable the discharge of the relevant pre-commencement conditions. In this context, a period of less than 4 years does not appear to be so significant as to indicate an intention to abandon.

15. I conclude that the Council's decision to refuse to grant a certificate of lawful use or development was not well founded and that the appeal should succeed.

B.S.Rogers

Inspector

[4] Hartley v MHLG [1970]1 QB 413
[5] Pioneer Aggregates (UK) Ltd v SSE [1984] JPL 651

The Planning Inspectorate

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND) ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 9 September 2020 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto were lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The planning permission (ref: WP/2013/0420/F), granted by the Borough Council of Wellingborough on 13 November 2013, has been lawfully implemented because a material operation comprised in the development, as defined by section 56(4) of the Act, was carried out on site prior to the expiration of the permission on 13 November 2016. This was an operation in the course of laying out or constructing a road or part of a road.

Signed

B.S.Rogers
Inspector

Date: 29 April 2021
Reference: APP/H2835/X/20/3263916

First Schedule:
Erection of workshop (Class B2) with ancillary offices (Unit A) together with separate office (Class B1) building (Unit B), new access road and parking in accordance with planning permission ref: WP/2013/0420/F, granted by the Borough Council of Wellingborough on 13 November 2013 and the drawings attached to it, and subject to the conditions set out in the permission.

Second Schedule

Land at former scrapyard, 304 Station Road, Isham, Northamptonshire as identified in the drawings attached to planning permission ref: WP/2013/0420/F, granted by the Borough Council of Wellingborough on 13 November 2013.

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the operations described in the First Schedule taking place on the land specified in the Second Schedule were lawful, on the certified date and, thus, were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.